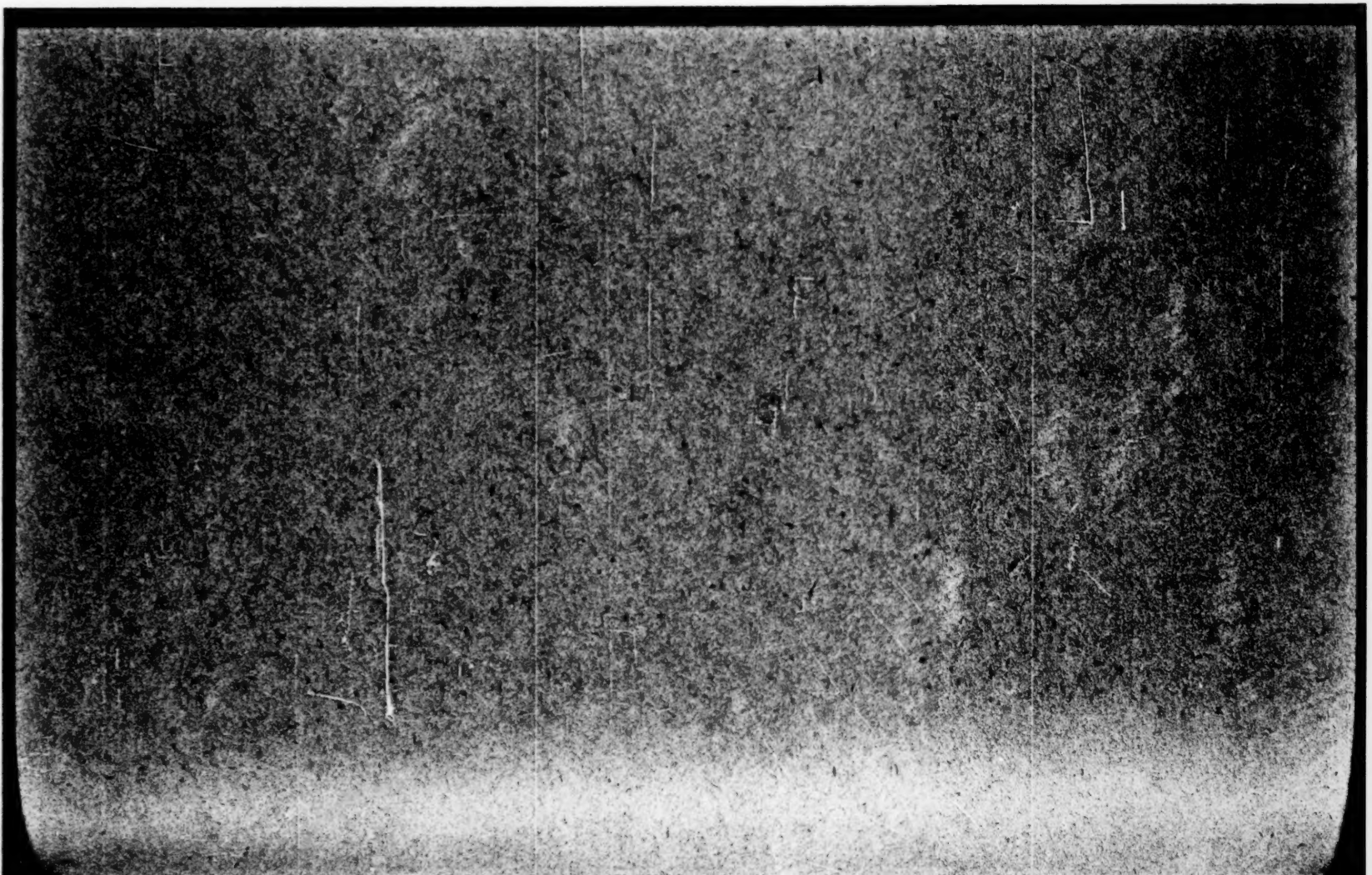

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 340

OLD COMPANY'S LEHIGH, INC.,

Petitioner,

against

HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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Counsel for Petitioner,
44 Court Street,
Brooklyn, New York.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, OLD COMPANY'S LEHIGH, INC., respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals, for the Second Circuit, to review the determination of that Court in so far as it affirms the decree of the District Court of the Southern District of New York, dismissing the first two counts of the amended bill of complaint of the petitioner. The opinion of said Court was filed on June 4th, 1934. A transcript of the record in the case, including the proceedings in the said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38 of this Court.

Summary and Short Statement of the Matter Involved.

1. Nature of suit and decisions below.

This suit in equity was brought by OLD COMPANY'S LEHIGH, INC., in the United States District Court, fo

the Southern District of New York, against the defendants, HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC. Three causes of action are alleged which are summarized in the opinion of the Circuit Court as follows:

> "The plaintiff, a New Jersey corporation, was the owner of a promissory note for $3,000. made by R. G. Brewer, Inc., a New York corporation, to the order of the plaintiff, and payable on January 16, 1933, at the office of the First National Bank of Mamaroneck, a corporation organized under the national banking laws. On January 12, 1933, the plaintiff deposited this note for collection with a bank in Philadelphia, which forwarded it through the Chase National Bank and the Federal Reserve Bank of New York to the said Mamaroneck bank for collection. The latter, on January 14, 1933, accepted the check of R. G. Brewer, Inc., for $3,015. drawn upon its general deposit with said Mamaroneck bank, and delivered the note to its maker. January 14th was a Saturday, and on the following Monday, the 16th, the Mamaroneck bank did not resume business because of insolvency. In due course the defendant Meeker was appointed its receiver by the Comptroller of the Currency. Subsequently, the plaintiff filed with him a preferred claim for the sum of $3,015., which he rejected. The foregoing facts are alleged in the first count of the plaintiff's amended bill of complaint.
>
> The second count repeats the allegations of the first and adds the following: The Mamaroneck bank was insolvent on January 14th, and Mr. Brewer, who acted for the maker of the note and was also a director and managing officer of the bank, was

well aware of its insolvency and imminent receivership, by delivering the note to the maker before its maturity and in accepting the maker's check on payment, the bank exceeded its authority as agent for collection. It is charged that in so acting it was carrying out a conspiracy with R. G. Brewer, Inc., to discharge the latter's liability on its note and to defraud the plaintiff. When the bank accepted the check, R. G. Brewer, Inc., had on deposit with the bank ample funds to cover the amount thereof, and by acceptance of the check the sum of $3,015. was immediately charged against the account of R. G. Brewer, Inc., and became a special trust fund in the possession of the bank to be remitted to the plaintiff, but it was not remitted.

The third count reiterates the allegations of the first and second and alleges further that the said check was accepted on January 14th, after banking hours and was not charged by the bank against the deposit ccount of R. G. Brewer, Inc., that the receiver has possession of the check which has not yet been discharged or cancelled, and that the plaintiff has demanded that the bank and its receiver assign and deliver the check to the plaintiff, but they have refused to do so."

The amended bill of complaint prays that the receiver be directed to pay the plaintiff's claim for Three Thousand and Fifteen ($3,015.00) Dollars in priority to claims of general creditors, or in the alternative that the bank and the receiver be ordered to assign and deliver said check to the plaintiff and that the defendant, R. G. Brewer, Inc., be ordered and decreed to pay the principal of said check with interest to the plaintiff.

The District Court dismissed all of the three counts in the plaintiff's amended bill of complaint on motion

of the defendant, MEEKER, as Receiver. On the appeal to the Circuit Court of Appeals, for the Second Circuit, the Circuit Court of Appeals affirmed the decree of the District Court with respect to the first two counts of the plaintiff's bill of complaint and reversed the same with respect to the third count.

The opinion of the Circuit Court of Appeals written by Circuit Judge Swan, upholds the petitioner's contentions with respect to the first two counts, to the effect that the Mamaroneck Bank received the note for collection as plaintiff's agent pursuant to the provisions of Section 350-a of the New York Negotiable Instruments Law, and that therefore whatever the bank collected upon the note was held in trust for the plaintiff by the bank as agent, and if traced into the hands of the receiver it might be reclaimed. However, the Circuit Court maintains that there is no identifiable *res* in the hands of the receiver which could be the subject of the trust. Although the Circuit Court agrees that the collecting bank acted as agent for the plaintiff and therefore held in trust anything collected upon the note, it refuses to apply the equitable doctrine that equity considers that done which in good conscience should be done, and that therefore the bank's acceptance of the check should be considered the same as though the depositor had cashed his check and handed the cash back over the counter in payment of the note, in which event, such cash would have been considered as a special fund held in trust by the bank belonging to its principal, the owner of the note, for whom the bank, as agent, received such cash in payment.

The plaintiff contended that, although the depositor had not actually cashed its check and handed the cash back over the counter in the eyes of a court of equity which treats that done which in good conscience should be done, the acceptance by the bank of the check of its

depositor resulted in creating a special deposit out of the cash in the vaults of the bank at that time, which special deposit was held in trust for the benefit of the principal, and that since the bank had not segregated and set aside this amount of money from its general funds at that time but had allowed it to remain commingled with the balance of its funds, the entire mass was impressed with a trust in favor of the plaintiff. The assets of the bank having passed into the hands of the receiver, increased by the amount of plaintiff's special deposit wrongfully commingled therewith, those assets are held by the defendant receiver subject to a preferential claim in favor of the plaintiff for the amount of its special deposit.

This view urged by the plaintiff is not only supported by decisions of many state courts, but is also supported by the Circuit Court of Appeals, for the Fifth Circuit, in the case of *Davis* v. *McNair,* 48 F. (2d) 494, which case was referred to by this Court in its decision in the case of *Blakey* v. *Brinson,* 286 U. S. 254, and in which this court stated that such a procedure, if carried out, might form the basis for the inference that a depositor of a bank no longer content with the role of a creditor had sought to establish a trust fund. The Circuit Court of Appeals, for the Second Circuit, in its opinion, refers to this very decision of this court in *Blakey* v. *Brinson, supra,* but overlooks the careful distinction drawn by this court in its opinion in the *Blakey* case, indicating that this court was not opposed to the view expressed in the case of *Davis* v. *McNair, supra,* to the effect that the "as if" doctrine applies where the intention to create a trust fund can be inferred from the acts of the parties.

Under the facts existing in the case at bar, no other inference is possible because the relationship between the collecting bank and the plaintiff was that of agent

and principal. The collecting bank, therefore, acted throughout with the intention that by accepting the check of its depositor in payment of the note due to its principal, it was doing the very same thing as if its depositor had cashed his check and handed the cash back over the counter to the bank in payment of the note, thereby establishing a trust fund belonging to the principal as the proceeds collected by the bank for the payment of the note.

The second point upon which the Circuit Court of Appeals, for the Second Circuit, refused to sustain the plaintiff's right to a preferred claim is as follows:

The plaintiff, in its first and second cause of action, also predicated its right to a preferred claim against the receiver of the bank by virtue of the provisions of Section 350-1, Subdivision 2, Article 19-A of the Negotiable Instruments law of the State of New York, commonly known as the Uniform Banking Code. This state statute grants a lien and impresses a trust on the assets of the collecting bank in favor of the owner of the note placed with it for collection. The Circuit Court of Appeals, for the Second Circuit, in its opinion, held that this section of the Uniform Banking Code is contrary to the Act of Congress (12 U. S. C. A. § 194), but also points out, in its opinion, contrary federal authorities on this point, namely, *Royal Mfg. Co.* v. *Spradlin,* 6 F. Supp. 98 (D. C. M. D. N. C.); *U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am.,* 4 F. Supp. 569 (D. C. N. Ind.). The opinion of the Circuit Court, for the Second Circuit, thus indicates that there is a conflict of authority in the Federal Courts as to the validity of this section of the Uniform Banking Code. The salutary provisions of a state statute constituting a part of the Uniform Banking Code should not be lightly brushed aside unless its conflict with the act of Congress (12 U. S. C. A. § 194) is established

beyond doubt. The review by this court of the decision of the Circuit Court holding this state statute as contrary to the act of Congress is warranted not only because of the conflict of authority in the Federal Courts on this point, but because such an important and far reaching enactment (made uniform in many of the several states) should be upheld by the Federal Courts unless it is established beyond any doubt that the apparent conflict with the act of Congress is beyond reconciliation.

Reasons Relied on for the Granting of a Writ of Certiorari.

The discretionary power of this court is invoked upon the following grounds:

1. The effect of the decision of the Circuit Court of Appeals, for the Second Circuit, in this case, is to nullify the provisions of Section 350-1, Subdivision 2, Article 19-A of the New York Negotiable Instruments Law, representing part of the Uniform Banking Code, in so far as its provisions affect national banks. No federal decisions other than that of the Circuit Court of Appeals, for the Second Circuit, in this case, declaring this state statute to be in conflict with the act of Congress (12 U. S. C. A. § 194), seem to be reported. On the other hand, the only other federal decisions dealing with the validity of similar state statutes are the cases of *Royal Mfg. Co.* v. *Spradlin, supra,* and *U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am., supra,* both of which uphold the validity of such state statutes. We, therefore, find a distinct conflict existing on this point between the Second Circuit and the other two jurisdictions.

The two cases of *Royal Mfg. Co.* v. *Spradlin, supra,* and *U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am., supra,* support the view of the plaintiff that the state statute creates a lien and impresses a trust which is

in being before the insolvency of a national bank takes place, and that therefore the state statute does not seek to regulate the distribution of the assets of an insolvent national bank. The federal rule does not require that money in the possession of a national bank shall be considered as assets, so that any monies in the possession of a national bank which are subject to a lien or trust created by the operation of a state statute, such monies in passing to the hands of the receiver upon insolvency pass subject to the lien, or trust, created by the state statute.

It is respectfully submitted that the great benefits resulting to the community by the adoption of uniform legislation in the several states should be upheld, in the Federal Courts, unless a conflict between such state statute and the acts of Congress is evident and proves to be beyond the hope of reconciliation. The granting of a writ of certiorari in the case at bar, and a review by the Supreme Court of this question, resolving the conflict of authority in the Federal Courts and settling the question of the validity of this section of the Uniform Banking Code, will result in a great benefit to the community, and will correct the injustice to the petitioner who has been deprived of the protection of this state statute.

2. The construction of the Circuit Court of Appeals, for the Second Circuit to the effect that, without the aid of the provisions of the state statute, it is necessary to trace into the hands of the receiver an identifiable sum of money held in trust when the bank closed its door in order to establish a preferred claim in favor of the plaintiff, has not only resulted in a great injustice to the plaintiff but has added to the confusion and to the conflict of authority that now exists in several of the Circuit Courts on this question. The petitioner respectfully submits that it can make no difference that

instead of cashing a check and then delivering the money to the bank in payment of the plaintiff's note, the depositor delivered his check to the bank who charged his account with the amount of the check and delivered to him the note of the plaintiff which it was collecting as the agent of the plaintiff. There is nothing in the act of Congress (12 U. S. C. A. § 194), which requires a Federal Court to disregard all equitable principles and maxims upon the insolvency of a national bank. Since equity considers the substance of things rather than their form and considers that done which in good conscience should be done, it is respectfully submitted that without actual delivery to the customer and a redeposit by him for a special purpose, a general deposit may by agreement be converted into a special deposit and become a fund in the hands of the banker with which he is entrusted for the specific purpose named in the agreement creating the special deposit.

In view of the fact that the collecting bank herein acted as agent for the plaintiff and received the proceeds of the collection in trust for the plaintiff, no other intention can be attributed to the collecting bank than that it intended by the acceptance of the check of its depositor to create a special deposit out of its general deposit and to hold the same in trust to be remitted to the plaintiff in payment of its note. Although this special deposit was not segregated and was commingled with the remaining funds of the bank, the entire mass is subject to a trust in favor of the plaintiff.

In the case of *Blakey* v. *Brinson, supra,* this court considered this question, and though it found a debtor and creditor relation existing throughout between the bank and its depositor, under the facts in that case, it referred to the "as if" doctrine urged by the petitioner herein and approved in the case of *Davis* v. *McNair, supra,* and indicated that the "as if" doctrine would apply where the facts warranted the inference that there

was an intention to cancel the debtor and creditor relationship and to create a special fund for a specific purpose.

It is, therefore, respectfully submitted that the granting of a writ of certiorari in the case at bar, and the consideration by this court of this question on appeal, will serve to definitely settle this question on which the Circuit Courts are in conflict, and will restore to the petitioner the rights to which it is entitled under the elementary principles of equity which have become clouded and confused in cases of this character because of the conflicting opinions of several of the Circuit Courts.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 438, *Old Company's Lehigh, Inc., Appellant* v. *Henry E. Meeker, as Receiver of the First National Bank in Mamaroneck, The First National Bank in Mamaroneck and R. G. Brewer, Inc., Appellees,* and that the said decree or judgment of the said United States Circuit Court of Appeals for the Second Circuit, in so far as it affirms the decision of the District Court dismissing the first two counts of the amended bill of complaint, be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

OLD COMPANY'S LEHIGH, INC.,
By JOSEPH G. M. BROWNE,
Counsel for Petitioner.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals, for the Second Circuit, is reported in 71 F. (2d) 280.

Jurisdiction.

The grounds of jurisdiction are as follows:

1. The decision of the Circuit Court of Appeals, for the Second Circuit, was filed on June 4th, 1934.

2. The judgment was rendered in a suit in equity.

3. The statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, 28 U. S. C. A. Sec. 347, as amended by the Act of February 13, 1925.

Statement.

The facts are stated in the petition.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is allowed are that the Circuit Court of Appeals, for the Second Circuit, erred:

1. In holding that the plaintiff has failed to state a cause of action in equity in the first and second counts of its amended bill of complaint by construing Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Banking Code, to be contrary to the Act of Congress (12 U. S. C. A. §194).

2. In holding that the plaintiff has failed to state a cause of action in equity in the first and second counts

of its amended complaint by failing to establish an identifiable sum held on trust although plaintiff claims a special deposit commingled with the general funds of the bank, which general funds should be impressed with a trust.

Summary of Argument.

POINT I. The decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Banking Code, is in conflict with the Act of Congress is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said Act of Congress.

POINT II. The construction of the Circuit Court of Appeals for the Second Circuit requiring the tracing of an identifiable sum of money when the bank closed its doors, is erroneous and is based on a misconception of the views of this court as expressed in the case of *Blakey* v. *Brinson, supra.*

ARGUMENT I.

The Decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Banking Code, is in conflict with the Act of Congress is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said Act of Congress.

This Court, in the case of *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, carefully distinguished the elements which indicate when a state statute is not in con-

flict with the Act of Congress which requires the making of ratable dividends. We quote from said decision the portion which sets forth the requirements necessary:

> "True it is that where, by State law a lien is made to result from a particular contract, that lien, when its existence is not incompatible with the Act of Congress, will be enforced. True, also, where a particular contract is made by a national bank which from its nature gives rise at the time of the contract to a claim on a specific fund, such claim, if not violative of the Act of Congress will be allowed. To that effect are the authorities relied on.
>
> Thus it was said by this Court in *Scott* v. *Armstrong,* 146 U. S. 499, when dealing with the question of setoff: 'The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor, does not belong to the bank.' So in the case of *San Diego County* v. *California Nat. Bank,* 52 Fed. Rep. 59, it was decided that the funds received by a national bank, which the party deposited had no authority of law to deposit, were not part of the assets to be 'ratably distributed', but must be returned in full to the rightful owner. And, again in *Massey* v. *Fisher,* 62 Fed. Rep. 958, which was a case where an indorser paid the amount of a note to a bank and took a receipt, but before he took the note from the bank the bank failed, the substance of the decision was, that the money did not belong to the bank, but was held by it in trust; and, of course, in that case it was not part of its assets."

Although this Court determined, in the *Elmira* case, that the state statute there under consideration did not

fulfill these requirements and was therefore in conflict with the federal law, it recognizes that where the lien created by the state statute arose from a relationship that was not of an ordinary creditor and gave rise to a specific lien resulting from the contract which was in being before the insolvency took place, such state statute would be valid. The opinion in the *Elmira* case, *supra*, refers again to the cases cited by it on this point and continues as follows:

> "They all reason to demonstrate that from the particular facts stated the relation was not that of an ordinary creditor, but was one giving rise to a specific lien or rights resulting from the contract and which was in being before the insolvency took place."

In the case at bar, the Circuit Court of Appeals, for the Second Circuit, in deciding against the validity of the state statute herein, directs attention to two contrary federal authorities. We quote from the first of these recent cases, namely, *United States Fidelity and Guaranty Co.* v. *National Bank of America*, 4 Fed. Supp. 569, as follows:

> "The question then resolves itself to the inquiry as to whether the money in the hands of the receiver as collected under the Indiana Uniform Bank Collection Code (Acts 1929, c. 164) was the money of the bank, and so constituted assets, or was the money held in, or impressed with, a trust, and hence not assets of the bank, which the receiver in charge could legally turn over to the Comptroller for ratable distribution under the federal Statute.
>
> There is no doubt that the National Banking Act (See 12 U. S. C. A., Section 21, *et seq.*) and deci-

sions of the federal courts control in the distribution of the assets of an insolvent national bank. They, the assets, must be ratably distributed to all the creditors, but did the money in controversy constitute assets of the bank? Did the money so collected belong to the bank? Did the bank get title to the money or was it the money of plaintiff held in trust by the insolvent bank?

Defendant argues that to adopt the theory that the Statute of Indiana in controlling on the question of agency is equivalent to holding that each State in the union may adopt rules for distribution of assets of insolvent national banks. The results are not so far-reaching.

The federal rule is that a receiver of an insolvent national bank shall turn over for distribution the assets of the failed bank, not the assets, cash, or property of some other person held by such insolvent bank as agent or in trust. The federal rule does not require that money in the possession of a national bank shall be considered assets.

The Indiana State rule is that money collected as this money was shall be held by the collecting bank as agent. There appears to be no conflict between the federal statute providing for ratable distribution of assets and the decisions of the federal Courts under that Statute and the Uniform Bank Collection Code of Indiana. National banks are amenable to the laws of the State in which they operate. They are governed in all respects by the State law, except where the State law contravenes the federal law, in which case the federal law is controlling. See *McClellan* v. *Chipman,* 164 U. S. 347, 17 S. Ct. 85, 41 L. Ed. 461, where the Supreme Court of the United States lays down the rule in the following language: 'The rule being the operation of

general State laws upon the dealings and contracts of national banks; the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the Stated States.'

The Court in this opinion used the following language: 'The purpose and object of Congress in enacting the national bank law was to leave such banks, as to their contracts in general, under the operation of the State law, and thereby invest them as federal agencies with local strength, while at the same time preserving them from undue State interference wherever Congress, within the limit of its constitutional authority, has expressly so directed, or wherever such State interference frustrates the lawful purpose of Congress, or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States.'

The State law of Indiana provides explicitly that the fund in question shall be held as agent or subagent. The federal law contains no contrary provision. To sustain plaintiff's contention is to give effect to the Indiana Code, as well as to the federal acts. To sustain defendant's contention would be to destroy the effect of the Indiana Code as applied to national banks. The constitutionality of the Indiana Uniform Bank Collection Code is not challenged. It is and was in full force and effect at the time of this transaction.

Sec. 2, Ch. 164 of the Indiana Acts of 1929, page 515, provides that 'where an item is deposited or received for collection, the bank of deposit shall be the agent of the depositor for its collection and

each subsequent collecting bank shall be subagent of the depositor.'

Sec. 1 of the same act at p. 514 provides that: 'The term bank shall include any person, firm or corporation engaged in the business of receiving and paying deposits of money within this State.'

No authority has been cited and I think none can be, that directs or permits the appropriation by a receiver of funds held in trust or as agent for another person. These funds must be paid over by the receiver to the owner thereof. They do not constitute assets of the failed bank, do not belong to the bank, and the receiver has no right to hold them or pay them over to the Comptroller for distribution or to do anything with them except to turn them over to the rightful owner, the plaintiff in this case."

The reasoning of the opinion in the foregoing case is so clearly applicable to the case at bar as to make it unnecessary to use further words to emphasize its application.

The other case cited by the Circuit Court on the same question is even more recent, and equally strong, in upholding the validity of a similar state statute. It is the case of *Royal Mfg. Co.* v. *Spradlin,* 6 Fed. Supp. 198, decided February 5th, 1934. We quote from said decision as follows:

"The mere fact that the proviso is attached to a section of the North Carolina statute dealing with the distribution of the assets of insolvent banks does not confine its operation to insolvent banks. It clearly establishes a lien in favor of one who sends by mail, etc., a draft, etc., for collection, with request that remittance be made therefor, and

which is collected by charging it to the account in the bank, and failing to remit therefor, or the non-payment of a check sent in payment therefor, which lien attaches to the assets of the bank making the collection from the date of the charge, entry, or collection of any such funds. The lien, therefore, is in no wise contingent upon the insolvency of the bank. It attaches, in all cases, 'from the date of the charge, entry or collection of any such funds.' The lien exists before insolvency and subsequent insolvency does not invalidate it. Moreover, it is not attempting to prefer one creditor over another in cases of insolvency, but the purpose of the act is to make a lien against the assets of any collecting bank until it pays the proceeds of collection made by it as agent. The language is perfectly plain. It was to put an end to court decisions making the collecting bank a mere common debtor and denying the principal the right to reach his property in the hands of his agent.

The banks receive a fee for collecting drafts sent to them. If a lien attaches in favor of the sender, if sent to a state bank, a national bank would be unable to compete in that field, with a state bank, if a similar lien does not attach against the assets of a national bank.

Assuming then that the state statute is applicable to national banks, does it conflict with the acts of Congress or frustrate the purposes for which national banks are created? Congress has not legislated at all on the liabilities of a bank as collecting agent. It has provided for the distribution of the assets of insolvent banks. 12 U. S. C. A. §194. But the provisions of this statute and 12 U. S. C. A. §91 do not conflict with the North Carolina statute,

nor does that statute in any way frustrate the objects for which national banks are created.

The case of *Dakin* v. *Bayly, supra,* involved the construction of a state statute in regard to set-off, and the decision turned on the construction of the state statute. It is an authority also for the proposition that the collecting bank is agent, not alone to collect, but to remit the proceeds of the collection. In view of this decision and of the others cited above, and of the state statute here involved, the assets in the hand of the receiver are subject to the lien created by the North Carolina statute, and the receiver must pay it out of the assets."

It is respectfully submitted that the opinion of the Circuit Court of Appeals, for the Second Circuit, destroys the benefits of the Uniform Banking Code in so far as it affects national banks. The state statute herein merely creates a lien against the assets of the bank based on the agency contract for collection. This lien comes into being before the insolvency takes place and therefore is not an attempt by the state to regulate the distribution of the assets of an insolvent national bank. The granting of a writ of certiorari herein, and the review of this question by this court on appeal, will not only serve to correct the injustice to the petitioner in the case at bar, but will prove of great benefit to the commercial community in settling the conflict of authority in the federal courts as to the validity of this section of the Uniform Banking Code in so far as it applies to national banks.

ARGUMENT II.

The construction of the Circuit Court of Appeals for the Second Circuit requiring the tracing of an identifiable sum of money when the bank closed its doors, is erroneous and is based on a misconception of the views of this Court as expressed in the case of *Blakey v. Brinson, supra.*

In the case of *Blakey* v. *Brinson, supra,* this Court determined that a debtor and creditor relation existed throughout between the bank and its depositor, but apparently does not disagree with the Circuit Court of Appeals, for the Fourth Circuit, in its reasoning wherein it sought to apply the "as if" doctrine. We quote from the decision in the case of *Blakey* v. *Brinson, supra*:

> "The Court below thought that the legal consequences to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See *Davis* v. *McNair,* 48 F. (2d) 494; *State* v. *Grills,* 35 R. I. 70, 75; 85 Atl. 281; *Northwest Lumber Co.* v. *Scandinavian American Bank,* 130 Wash. 33; 225 Pac. 825; *State* v. *American Exchange Bank,* 112 Neb. 834; 201 N. W. 895."

After citing the contrary authorities on this point, this Court indicates, in said opinion, a passive approval

of the "as if" doctrine where the facts warrant an inference that a debtor and creditor relationship was not intended, and the establishment of a trust fund was contemplated, by expressing its view with respect to such a situation as follows:

> "Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish a trust fund."

In the case of *Davis* v. *McNair, supra,* it was clearly shown that to support a trust, it is not necessary to have augmentation in the sense of new money being brought into the bank from the outside where the facts warranted the inference that the relation of the bank towards money which it theretofore held on general deposit was changed from that of owner to that of agent or trustee. In said case, the Court held that by what was done the relations of the parties with respect to the funds were so changed that thereafter the deposit was in the nature of a special fund, having the trust features of a special deposit. Such special deposit, though not segregated and set aside, and though it be commingled with the remaining funds of the bank, does not lose its trust features because it is confounded in the general mass. The modern rule holds that to accomplish the ends of justice, a trust will be impressed upon the entire mass.

Frelinghuysen v. *Nugent,* 36 Fed. 229, 239;
Peters v. *Baine,* 133 U. S. 670;
Brennan v. *Tillingast,* 201 Fed. 609;
Quin v. *Earle,* 95 F. 728, 731;
Central Nat. Bank v. *Conn. Mut. Life Ins. Co.,* 104 U. S. 54, 26 L. Ed. 693;

Knatchbull v. *Hallett,* 13 Ch. Div. 696; notes 32 Am. St. Rep. 129; L. R. A. 1916 C., 31;
Poisson v. *Williams,* 15 F. (2d) 582;
Schumacker v. *Harriet,* 52 F. (2d) 817;
Tucker v. *Newcomb,* 67 F. (2d) 177.

The Circuit Court of Appeals, for the Fifth Circuit, carefully expressed itself in a well reasoned decision on this question in the case of *City of Miami* v. *First National Bank of St. Petersburg,* 58 F. (2) 561, which said decision was cited with approval by this Court in the case of *Dakin* v. *Bayly,* 290 U. S. 143.

The same case came up for consideration a second time before the said Circuit Court after judgment, and in the second opinion the Court reversed its former position, basing its new decision on the ground that no identifiable *res* had been established upon which the trust could rest. The second decision of the Circuit Court of Appeals, for the Fifth Circuit, evidently was rendered without knowledge of the fact that this court had, in the case of *Dakin* v. *Bayly, supra,* cited its first opinion with approval.

A comparison of the latter opinion in the said case of *City of Miami* v. *First National Bank of St. Petersburg,* 69 F. (2d) 346, with the former opinion in the same case discloses that the reasoning in the second opinion cannot be reconciled with the reasoning of the first. Although the first opinion carefully and exhaustively considers every element involved, it contains no hint that an all destroying principle, in the form of a requirement of an identifiable *res,* lurked in the background. This question, of an identifiable *res,* upon which the second opinion is based is also the ground upon which the Circuit Court of Appeals, for the Second Circuit, in this case bases its denial of relief to the plaintiff. It conflicts with the "as if" doctrine passively

approved by this court in the case of *Blakey* v. *Brinson, supra,* and has served to add even greater confusion to conflict of views which previously existed on this point in several circuits.

A multiplying number of cases of this character, occasioned by the insolvency of numerous national banks due to the depression, are coming up with the increasing frequency before the federal courts in almost every jurisdiction. The granting of a writ of certiorari in the case at bar, and the affirmative approval by this court on appeal of the "as if" doctrine which was passively approved in the decision of the case of *Blakey* v. *Brinson, supra,* will restore to the petitioner the rights to which it is entitled in justice and equity and will prove of benefit to the community in resolving the conflict and confusion on this subject that now exists in the various circuits.

Conclusion.

For the foregoing reasons, it is submitted that this cause presents two important questions for consideration and determination by this Court, on both of which questions there is a conflict of authority in the federal courts, and the settlement of both of which would result in great benefit to the public. It is, therefore, respectfully submitted that the case justifies the issuance of a writ of certiorari.

Respectfully submitted,

JOSEPH G. M. BROWNE,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 340.

OLD COMPANY'S LEHIGH, INC.,
Petitioner,

against

HENRY E. MEEKER, as Receiver, for the FIRST NATIONAL BANK IN MAMARONECK, *et al.*,
Respondents.

BRIEF ON BEHALF OF PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

ISRAEL H. MANDEL,
Counsel for Petitioner.

JOSEPH G. M. BROWNE,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 340

OLD COMPANY'S LEHIGH, INC.,
Petitioner,
against
HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC.,
Respondents.

BRIEF ON BEHALF OF PETITIONER.

The opinion of the Circuit Court of Appeals, for the Second Circuit, is reported in 71 F. (2d) 280, (Rec. 23 to 28).

Jurisdiction.

The grounds of jurisdiction are as follows:

1. The decision of the Circuit Court of Appeals, for the Second Circuit, was filed on June 4th, 1934.

2. The judgment was rendered in a suit in equity (Rec. 18).

3. The statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, 28 U. S. C. A. § 347, as amended by the Act of February 13, 1925.

4. The petition for a writ of certiorari herein was duly granted (Rec. 29).

Statement.

The facts are not in dispute and are as follows:

This suit in equity was brought by Old Company's Lehigh, Inc., in the United States District Court, for Southern District of New York, against the defendants' HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC. Three causes of action are alleged in which are summarized in the opinion of the Circuit Court as follows:

> "The plaintiff, a New Jersey corporation, was the owner of a promissory note for $3,000. made by R. G. Brewer, Inc., a New York corporation, to the order of the plaintiff, and payable on January 16, 1933, at the office of the First National Bank of Mamaroneck, a corporation organized under the national banking laws. On January 12, 1933, the plaintiff deposited this note for collection with a bank in Philadelphia, which forwarded it through the Chase National Bank and the Federal Reserve Bank of New York to the said Mamaroneck bank for collection. The latter, on January 14, 1933, accepted the check of R. G. Brewer, Inc., for $3,015. drawn upon its general deposit with said Mamaroneck bank, and delivered the note to its maker. January 14th was a Saturday, and on the following Monday, the 16th, the Mamaroneck bank did not resume business because of insolvency. In due course, the defendant Meeker was appointed its receiver by the Comptroller of the Currency. Subsequently, the plaintiff filed with him a preferred claim for the sum of $3,015., which he rejected.

The foregoing facts are alleged in the first count of the plaintiff's amended bill of complaint.

The second count repeats the allegations of the first and adds the following: The Mamaroneck bank was insolvent on January 14th, and Mr. Brewer, who acted for the maker of the note and was also a director and managing officer of the bank, was well aware of its insolvency and imminent receivership, by delivering the note to the maker before its maturity and in accepting the maker's check on payment, the bank exceeded its authority as agent for collection. It is charged that in so acting it was carrying out a conspiracy with R. G. Brewer, Inc., to discharge the latter's liability on its note and to defraud the plaintiff. When the bank accepted the check, R. G. Brewer, Inc., had on deposit with the bank ample funds to cover the amount thereof, and by acceptance of the check the sum of $3,015. was immediately charged against the account of R. G. Brewer, Inc., and became a special trust fund in the possession of the bank to be remitted to the plaintiff, but it was not remitted.

The third count reiterates the allegations of the first and second and alleges further that the said check was accepted on January 14th, after banking hours and was not charged by the bank against the deposit account of R. G. Brewer, Inc., that the receiver has possession of the check which has not yet been discharged or cancelled, and that the plaintiff has demanded that the bank and its receiver assign and deliver the check to the plaintiff, but they have refused to do so." (Rec. 23 to 24).

The amended bill of complaint prays that the receiver be directed to pay the appellant's claim for